

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75- **75-1913**

**CHARLES HABRON; WILLIAM ESCH;
FRANK GLORIOSO; RUDY SPENCER;
JOHN SIGLER, JR.; and WALTER HAWSE,**
Appellants,

v.

**HARVEY A. EPSTEIN, Commissioner of Labor and
Industry of the State of Maryland; and
BALTIMORE BUILDING AND CONSTRUCTION
TRADES COUNCIL,**
Appellees.

**ON APPEAL FROM A DECISION OF THE
THREE JUDGE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

INTRODUCTION

This is an appeal from a final judgment of the Three Judge United States District Court for the District of Maryland filed on April 7, 1976. The appellant submits this jurisdictional

statement to show that this Court has jurisdiction of the appeal, and that a substantial federal question is presented.

OPINION BELOW

The opinion below by the Honorable Chief Judge Edward S. Northrop of the United States District Court for the District of Maryland, together with the dissenting opinion by the Honorable Senior Judge R. Dorsey Watkins of the same court, is reported at _____ F. Supp. _____ (D. Md. 1976). A copy of the opinion is set out in full in Appendix A.

JURISDICTION

This suit is one to declare unconstitutional a Maryland statute which prohibits helpers from being employed on public works projects valued at over \$500,000.00, and to enjoin its enforcement by state authorities. The judgment of the United States District Court for the District of Maryland was entered on April 7, 1976. Notices of Appeal were filed with the United States District Court on May 4 and 7, 1976.

The court below was a three-judge district court convened under 28 U.S.C. Section 2281 (1970). Because the action sought injunctive and declaratory relief on the basis of the unconstitutionality of the state statute, the convocation of a three-judge court was proper. See *King v. Smith*, 392 U.S. 309, 88 S. Ct. 2128 (1968); *Alabama Public Service Commission v. Southern Railroad Company*, 341 U.S. 341, 71 S. Ct. 762 (1951).

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. Section 1253 (1970). The denial of Plaintiffs' request for declaratory judgment was a *per se* denial of the

requested injunction. By refusing to declare the challenged statute unconstitutional the three-judge court implicitly denied to enjoin its enforcement by state authorities. In *MTM, Inc. v. Baxley*, _____ U.S. _____, 95 S. Ct. 1278, 1281 (1975), the court set forth the standards for direct appeal jurisdiction under Section 1253. "In light of these factors, we conclude that a direct appeal will lie to this court under Section 1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below." Also see *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 95 S.Ct. 289 (1974).

The order of the three-judge court was based on its finding that the Maryland statute passes constitutional muster. The merits of the constitutional claim were resolved by the court and thus, Section 1253 jurisdiction is properly invoked.

Alternatively, should this court find that it does not have jurisdiction over the case, appellants' request that this court vacate the judgment of the District Court and direct that court to enter a new judgment, from which appellants can take an appeal to the United States Court of Appeals for the Fourth Circuit. Where the time for taking an appeal to the Court of Appeals has expired, as in this case at bar, this court has invoked the above requested procedure in order not to deny appellants an avenue of appeal. See *Rockefeller v. Catholic Medical Center*, 397 U.S. 820 (1970); *Gerstein v. Coe*, 417 U.S. 279 (1974).

STATUTE INVOLVED

The case involves the validity of *Maryland Annotated Code* art. 100, Section 105 A (Supp. 1975). This statute is set out in Appendix B.

QUESTION PRESENTED

The Maryland Statute prohibits workers classified as helpers from being employed on public works projects valued at over \$500,000.00. The question presented by this appeal is whether such prohibition violates the helpers' Fourteenth Amendment Rights to the equal protection of the laws. In addition, should the court apply the "rational basis" test in making this determination, or, are the rights involved of such importance that the "compelling state interest" test should be utilized?

STATEMENT OF THE CASE

Appellants, Charles Habron, William, Esch, Frank Glorioso, Rudy Spencer, John Sigler, Jr., and Walter Hawse, instituted this action in 1974. They sought to challenge *Maryland Annotated Code* art. 100, § 105A (Supp. 1975), which provides in part: "No person classified as a helper or trainee shall be employed on public works." Appellants, all of whom are employed in construction projects as helpers, challenged the statute as being a violation of the fourteenth amendment to the United States Constitution. They claimed that the statute, by denying them the opportunity to gain employment in public works projects, and by specifically allowing apprentices to be employed on such projects, denied appellants the equal protection of the laws. (Although § 105A purports to deny helpers employment on all public works, the term "public works" is defined in § 96 of the same article, which provides that only projects valued over \$500,000 are included in the statutory definition. The definition in § 96 is applicable to the restrictions in § 105A).

Appellants requested declaratory and, by amended complaint, injunctive relief from the enforcement of the statute. The case was transferred to a three-judge district court, pursuant to 28 U.S.C. § 2281 (1970) on December 23, 1974. The Baltimore Building and Trades Council intervened as a defendant in early 1975, joining defendant-appellee Harvey A. Epstein. Also in 1975, the International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile Helpers and Finishers, Marble Setters Helpers, Marble Mosaic and Terrazzo Workers Helpers intervened as plaintiffs.

On April 7, 1976, the district court, by a split decision, denied plaintiffs'-appellants' petition for declaratory relief. The court held that the statute should be judged according to the "rational basis" test of equal protection, and that under that test the statute was supported by at least three legitimate purposes: (1) promoting safer working conditions; (2) reducing unemployment and encouraging workers to obtain skilled training; and (3) encouraging formalized apprentice training, resulting in more skilled craftsmen of all-around competence, able to work without close supervision, and to adapt to constantly changing work procedures. The court thus sustained the constitutionality of Section 105 A.

CONCLUSION

The questions presented in this appeal are so substantial as to require plenary consideration, with briefs on the merits and oral arguments, for their resolution because:

1. There is no other statute in any other state that is identical with the one that is the subject of this appeal. It is, therefore, of great national importance that this Honorable Court consider this case.

2. To uphold as constitutional a state statute that prohibits a citizen from being employed on certain public works would open the door for similar legislation.

3. The bases on which the District Court found the statute to be constitutional apply equally as well to public works projects under \$500,000.00 and, therefore, the distinction is arbitrary. This is a case of first impression wherein a group of workers is prohibited from working on a public works project based on the cost of the project.

4. To permit the District Court's ruling to stand would approve as constitutional a statute which in effect declares that a certain group of citizens is unsafe, unskilled and incompetent to work on a certain category of public works projects while at the same time the group is safe, skilled and competent to work on other similar public works projects.

5. The Statute clearly is discriminatory against workers over thirty years of age.

6. In recent years the United States has witnessed a spiraling rate of unemployment which has severely crippled the country's economic stability. The issue of full employment is of great importance as evidenced by the impact caused in Congress by the introduction of bills designed to provide employment for all of the nation's work force. In this setting, any statute which prohibits employment should be carefully scrutinized.

Respectfully submitted,

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Counsel for Appellants.

A. 1

APPENDIX A

**OPINION OF THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MARYLAND**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

**CHARLES HABRON, WILLIAM ESCH,
FRANK GLORIOSO, RUDY SPENCER,
JOHN SIGLER, JR., and WALTER HAWSE,
Plaintiffs**

**INTERNATIONAL ASSOCIATION OF
MARBLE, SLATE AND STONE POLISHERS,
RUBBERS AND SAWYERS, TILE HELPERS,
AND FINISHERS, MARBLE SETTERS HELPLERS,
MARBLE MOSAIC AND TERRAZZO WORKERS
HELPERS,**

Intervening Plaintiffs

v.

**HARVEY A. EPSTEIN, Commissioner of
Labor and Industry of the
State of Maryland**

Defendant

**BALTIMORE BUILDING AND
CONSTRUCTION TRADES COUNCIL**

Intervening Defendant

**CIVIL ACTION NO. N-74-1314
(Filed April 6, 1976)**

**Three-judge court hearing before Winter, Circuit Judge, and
Northrop (Chief Judge) and Watkins, District Judges.**

A. 2

John J. Bishop, Jr., of Towson, Maryland, for plaintiffs and intervening plaintiffs.

Francis B. Burch, Attorney General of Maryland, Robert J. Aumiller and John J. Lucas, Assistant Attorneys General of Maryland, for defendant.

Peter G. Angelos and Stephen B. Caplis, of Baltimore, Maryland, for intervening defendant.

Northrop, Chief District Judge.

This action comes now before the Court on plaintiffs' prayer for declaratory judgment pursuant to 28 U.S.C. § 2201 (1970) to declare "unconstitutional and contrary to Section 1 of the 14th Amendment of the United States" Section 105A, Article 100 of the Maryland Code, which, summarized, prohibits the use of persons categorized as "helpers" on state construction projects. MD. ANN. CODE Art. 100, § 105A (Cum. Supp. 1975). Jurisdiction is properly invoked by the complaint under 28 U.S.C. § 1331 (1970), federal question jurisdiction, and also 42 U.S.C. § 1343(3)(4) (1970), the general civil rights authorizing statute, by amended complaint. A three-judge District Court is appropriate for this case pursuant to 28 U.S.C. § 2281 (1970).¹

FACTUAL BACKGROUND

In 1970, the Maryland Legislature enacted a prevailing wage law applicable to all public works projects in Maryland in excess of \$500,000. Now codified in MD. ANN. CODE Art. 100 § 96 *et seq.* (Cum. Supp. 1975). In 1973, the Legislature added to the statute Section 105A, "Employment of Apprentices,"

¹ Since the instant action seeks a declaratory judgment declaring Section 105A, a state statute, unconstitutional, convocation of a three-judge court is proper. *See King v. Smith*, 392 U.S. 309, 88 S.Ct. 2128 (1968); *Alabama Public Service Comm'n. v. Southern Ry. Co.* 341 U.S. 341, 71 S.Ct. 762 (1951).

A. 3

the subject of the within controversy. Section 105A, in effect, specifically precluded the use of "helpers"² and authorized the use of apprentices³ on public works projects valued over \$500,000. Section 105A mandated that:

² Helper has been defined by stipulation as:

A worker who assists another worker, usually of a higher level of competence or expertness, by performing a variety of duties, such as furnishing another worker with materials, tools, and supplies; cleaning work area, machines, and equipment; feeding or off-bearing machine; holding materials or tools; and performing other routine duties. A HELPER may learn a trade but does so on his own without an agreement with his employer that such is the purpose of their relationship. Consequently, the title HELPER is sometimes used as synonym for APPRENTICE, a practice that is incorrect technically. A worker whose duties are limited or restricted to one type of activity, such as moving materials from one department to another, feeding machines, removing products from conveyors or machines, or cleaning machines or work areas is not technically a HELPER and is classified according to duties performed as MATERIAL HANDLER: MACHINE CLEANER: PORTER II. A worker who performs a variety of duties to assist another worker is a HELPER technically and is classified according to worker assisted as BRICKLAYER HELPER (const.); DRY-CLEANER HELPER (clean., dye., & press.).

³ Apprentice has been defined by stipulation as:

A worker who learns, according to a written or oral contractual agreement, a recognized skilled craft or trade requiring two or more years of on-the-job training through job experience supplemented by related instruction, prior to time that he may be considered

A. 4

No person classified as a helper or trainee shall be employed on public works. Only apprentices in a trade, craft or occupation for which an apprenticeship program has been approved by the apprenticeship and training council of the Department of Licensing and Regulation shall be employed on

Footnote 3 (Continued)

a qualified skilled worker. APPRENTICES are seldom over 30 years of age. High School or vocational school education is generally a prerequisite for entry into an apprenticeship program. Provisions of apprenticeship agreement regularly include length of apprenticeship; a progressive scale of wages; work processes to be taught; and amount of instruction in subjects related to the craft or trade, such as characteristics of materials used, selected shop mathematics, and blueprint reading. Apprenticeship of a particular craft or trade is best evidenced by its acceptability for registration as a trade by a State apprenticeship agency or the Federal Bureau of Apprenticeship and Training. Generally, where employees are represented by a union, apprenticeship programs come under the guidance of joint apprenticeship committees composed of representatives of the employers or the employer association and representatives of the employees. These committees may determine need for APPRENTICES in a locality and establish minimum apprenticeship standards of education, experience, and training. In instances where committees do not exist, apprenticeship agreement is made between APPRENTICE and employer, or an employer group. The title, APPRENTICE, is often loosely used as a synonym for beginner, HELPER, or LEARNER. This practice is technically incorrect and leads to confusion in determining what is meant. Typical classifications for APPRENTICES are BLACKSMITH APPRENTICE (forging); MACHINIST APPRENTICE (mach. shop); PLUMBER APPRENTICE (const.).

A. 5

public works. Each apprentice employed on a public works shall be paid not less than the percentages, as set forth in such approved apprenticeship program, of the journeyman mechanic's prevailing hourly rate of wages as determined by the Commissioner of Labor and Industry for such journeyman mechanic in the trade, craft or occupation in which the apprentice is employed on the public works.

Plaintiffs in this action are persons who are employed or have been employed as helpers in Maryland. They claim to be adversely affected by the enforcement of Section 105A. Their complaint states that as a result of the statute they "will continue to be deprived from working on public works projects of the State of Maryland thereby impairing their ability to earn their livings and support themselves and their families . . ." Moreover, plaintiffs assert that Section 105A works as "an invidious, arbitrary, unreasonable and unconstitutional discrimination against them . . . [which] deprives them of the equal protection of the laws . . ." Plaintiffs' Complaint at 4.

Defendants assert that the statute is constitutionally valid since there is a rational basis and compelling state interest to proscribe employment of helpers on public works projects. Defendants aver that "Maryland has the authority consistent with the requirements of the Fourteenth Amendment to regulate an occupation or craft affecting the public interest by establishing qualifications which are reasonably related to insuring the competency of its practitioners within that occupation." Defendants' Answer to Complaint at 2-3.

The matter was heard before this Court on October 20 and 21, 1975. The Court therein received substantial testimony designed to buttress the respective parties' contentions and legal theories.

FINDINGS OF LAW AND FACTS

To properly adjudicate the merits of plaintiffs' allegation of denial of equal protection, this Court must consider three significant questions: (1) What standard should be employed to determine whether the statute in question violates the equal protection clause — the "rational basis" or the "compelling state interest" test? (2) If the "rational basis" standard is invoked, how is it to be divined? and, (3) Do the facts as presented in the pleadings and at the trial satisfy the standard?

Recently, when adjudicating allegations of equal protection violations, courts have subjected statutes to two forms of scrutiny — the low scrutiny test or the "rational basis" test and the strict scrutiny test, or the "compelling state interest" test. Of the two tests, the more stringent test has been applied in two situations: those in which the *basis* of the distinction or classification drawn by the state is inherently *suspect*; and those in which the *effect* of the distinction is to impair a person's *fundamental* rights. See *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 178-81, 92 S. Ct. 1400, 1408-09 (1972). If the classification in question rests on either inherently suspect grounds or hinders a fundamental right, it will only be sustained if the enactment is shown to promote a compelling state interest. Cf., *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029 (1972). The Supreme Court over the last few decades has identified certain classifications as suspect, for example — race, *Hunter v. Erickson*, 393 U.S. 385, 89 S. Ct. 557 (1969); *McLaughlin v. State*, 379 U.S. 184, 85 S. Ct. 283 (1964); *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193 (1944); alienage or national origin, *Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848 (1971); *Oyama v. State*, 332 U.S. 633, 68 S. Ct. 269 (1948); illegitimacy, *Gomez v. Perez*, 409 U.S. 535, 93 S. Ct. 872 (1972); religion, *Sherbert v. Verner*, 373 U.S. 398, 83 S. Ct. 1790 (1963); or, in certain instances, wealth, see *James v. Valtierra*, 402 U.S. 137, 91 S. Ct. 1331 (1971) (Marshall, J., dissenting) [citing numerous cases which held that discrimination between rich and poor *as such* is a suspect classification].

The plaintiffs do not contend, nor do the facts illustrate, a suspect classification under any of the foregoing. However, plaintiffs do argue that the strict standard is applicable to review of Section 105A because of the statute's interference with a "fundamental" right — the right to work. Plaintiffs contend that this Court has been presented a sound basis for employing the compelling state interest test (while conceding that the so-called right to work has never been adjudged fundamental, calling for strict analysis). They reveal this basis in their Answer to Motion for Summary Judgment at 2:

The pursuit of happiness is recognized as a fundamental right to which all citizens are entitled. In today's society, happiness is inexorably related to one's economic status. The right to earn the means by which one pursues happiness can then be said to be fundamental.

While this argument is somewhat ingenious, we are not persuaded that this alleged right was ever intended to be, or should be, a fundamental right. Legislation requiring strict scrutiny is envisioned as being more than that which merely affects economics, but is "legislation which involves one of the basic civil rights of man." *Skinner v. State*, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113 (1942). The theory deprives principally from *Skinner*, where the Supreme Court first spoke of certain rights as being fundamental:

Marriage and procreation are *fundamental* to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types inimical to the dominant group to wither and disappear . . . *strict scrutiny of classification* which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.

Id. (emphasis added). (See *Griswold v. State*, 381 U.S. 479, 85 S. Ct. 1678 (1965), wherein *not* procreating is declared a fundamental right also.)

Subsequent to *Skinner*, the Court declared other rights to be so fundamental as to require strict scrutiny — voting, *Dunn v. Blumstein*, 405 U.S. 330, 92 S. Ct. 995 (1972); *Evans v. Cornman*, 398 U.S. 419, 90 S. Ct. 1752 (1970); *Carrington v. Rush*, 380 U.S. 89, 85 S. Ct. 775 (1965); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S. Ct. 1079 (1964); freedom from incarceration due to indigency, *Tate v. Short*, 401 U.S. 935, 91 S. Ct. 668 (1970); right to travel, *Dunn v. Blumstein*, *supra*; *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322 (1968); *United States v. Guest*, 383 U.S. 745, 86 S. Ct. 1170 (1966); and certain criminal procedures, *cf. Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585 (1956).

However, as conceded by the plaintiffs, courts have never seen fit to declare that the right to seek employment, unfettered by government regulation, is fundamental. In fact, courts have consistently *refused* to employ the strict compelling interest standard and opted for the lower scrutiny test for purely economic matters, such as the instant situation. See *e.g.*, *Two-Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 81 S. Ct. 1135 (1960); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 528, 79 S. Ct. 437, 441 (1959); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110, 69 S. Ct. 463, 465 (1949); *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78-79, 31 S. Ct. 337, 340-41 (1910); *Snell v. Wyman*, 281 F. Supp. 853, 867, *aff'd.*, 393 U.S. 323, 89 S. Ct. 553 (1968). Specifically on point with the instant case are numerous cases which applied the rationality test to state legislation restricting the availability of employment opportunities. *Goesaert v. Cleary*, 335 U.S. 464, 69 S. Ct. 198 (1948); *Kotch v. Board of River Port Pilots Com'rs.*, 330 U.S. 552, 67 S. Ct. 910 (1947). See also *Flemming v. Nestor*, 363 U.S. 603, 80 S. Ct. 1367 (1959).

In *Kotch v. Board of River Port Pilots Com're.*, *supra*, the bellwether employment case, the Supreme Court dealt with a statute similar to Section 105 of the Maryland Code. Plaintiffs therein, ship pilots, contested a Louisiana statute allowing only state-qualified pilots to navigate seagoing vessels into New Orleans harbor. The statute, in pertinent part, specified that a person could only become a state-qualified pilot after completion of a six-month apprentice program, which plaintiffs asserted was firmly under the pilot association's control. As a result, plaintiffs alleged that only family or friends of the incumbent pilots could ever become qualified to navigate ships into the harbor.⁴

After noting that pilots are essential to avoid traffic congestions and accidents and that pilotage is "a highly personalized" calling, the Court analyzed the problem:

We are asked, in effect, to say that Louisiana is without constitutional authority to conclude that apprenticeship under persons specially interested in a pilot's future is the best way to fit him for duty as a pilot officer in the service of the State.

330 U.S. at 559, 67 S. Ct. at 914. The Court thereafter came to the following conclusion:

The practice of nepotism in appointing public servants has been a subject of controversy in this country throughout our history. * * * We can only assume that the Louisiana legislature weighed the obvious possibility of evil against whatever useful function a closely knit pilotage system may serve.

⁴ Similar to the instant case, the river pilots contended that they were as fully qualified as persons chosen to be apprentices, in fact, the pilots in *Kotch* were accomplished pilots, with up to 15 years of previous piloting experience.

Thus the advantages of early experience under friendly supervision in the locality of the pilot's training, the benefits to morale and *esprit de corps* which family and neighborly tradition might contribute, the close association in which pilots must work and live in their pilot communities and on the water, and the discipline and regulation which is imposed to assure the State competent pilot service after appointment, might have prompted the legislature to permit Louisiana pilot officers to select those with whom they would serve.

* * * * *

The object of the entire pilotage law . . . is to secure for the State and others interested the safest and most efficiently operated pilotage system practicable. We cannot say that the method adopted in Louisiana for the selection of pilots is unrelated to this objective.

Id. at 563-64, 67 S. Ct. at 915-16.

Perhaps even a more striking case of the Supreme Court's application of this minimal review of state statutes can be found in *Railway Express*, where a New York City traffic regulation was contested in part as being in violation of the equal protection clause. The regulation in question prohibited the operation of any advertising vehicle on the streets, except those vehicles which displayed business notices or advertisements of the products of the owner and which were not used merely or mainly for advertising. *Railway Express* was convicted and fined for violation of the regulation because the advertising on its trucks was largely unconnected with its business. The transportation agency contended that: "one of the appellant's [Railway Express'] trucks carrying the advertisement of a commercial house would not cause any greater distraction of pedestrians and vehicle drivers than if the commercial house

carried the same advertisement on its own truck." 336 U.S. at 109-110, 69 S. Ct. at 465. In an opinion written by Mr. Justice Douglas, the Court held:

That, however, is a superficial way of analyzing the problem, even if we assume that it is premised on the correct construction of the regulation. The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than these of appellants.

We cannot say that the judgment is not an allowable one. Yet if it is, the classification has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection.

336 U.S. at 110, 69 S. Ct. at 465.

Consequently, since the rationale of the foregoing cases still obtain, this Court has no doubt that the low scrutiny rationality test is to be applied herein. We therefore turn to the second question presented, that of which definition of rationality is to be applied.

For many years the low scrutiny equal protection standard had never been specifically defined, but the cases offered an amalgam of reasoning out of which a principle emerged — that for a statute to be declared constitutional, it need only be shown that the statute was the type of statute a "rational" legislature could enact. *See e.g. Kotch v. Board of River Port Pilots Com'rs., supra; Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580, 55 S. Ct. 538 (1934); *Lindsley v. Natural*

Carbonic Gas Co., supra; Atchison T. & S.F. R. Co. v. Matthews, 174 U.S. 96, 19 S. Ct. 609 (1898). The Supreme Court in 1961, in *McGowan v. State*, 366 U.S. 420, 81 S. Ct. 1101, distilled the applicable precedent into what has since been cited as a generalized compendium setting forth the parameters of the theory:

Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. *A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.*

Id. at 425, 81 S. Ct. at 1105 (emphasis added).⁵

⁵ Since *McGowan* was rendered it has been oft-cited as the stellar case concerning the rationality test. Since it is crucial to the within question to show the acceptance of *McGowan*, this Court will cite all the cases which accepted its rationale. *Sosna v. Iowa*, ____ U.S. ____, 95 S. Ct. 553, 568 (1975) (Marshall, J., dissenting); *United States Dept. of Agri. v. Moreno*, 413 U.S. 538, 534, 93 S. Ct. 2821, 2825 (1973); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 51, 93 S. Ct. 1278, 1306 (1973); *Salter Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 732, 93 S. Ct. 1224, 1231 (1973); *Weber v. Aetna Casualty & Surety Co.* 404 U.S. 164, 181, 92 S. Ct. 1400, 1409 (1972) (Rehnquist, J., dissenting); *Lindsey v. Normet*, 405 U.S. 56, 72, 92 S. Ct. 862, 873 (1972); *Bullock v. Carter*, 405 U.S. 134, 142, 92 S. Ct. 849, 855 (1972); *Schilb v. Kuebel*, 404 U.S. 357, 364, 92 S. Ct. 479, 484

Plaintiffs, however, contend that the Supreme Court in recent years has been retreating from the criteria outlined in *McGowan* and that a new equal protection test is emerging. They bottom this contention on an article written by Gerald Gunther which appeared in the Harvard Law Review, *In Search Of Evolving Doctrine On A Changing Court: A Model For A Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972), wherein the author contended that the traditional standard (*McGowan*) was being, or should have been, replaced by a new standard — that the legislative means “substantially further” the legislative purpose of the statute.

After careful consideration of the article and thesis presented therein, this Court is of the opinion that, for two reasons, time has proven this theory invalid for our purposes. First, by Gunther's own choice of title, it must be recognized that the article deals with an evolving model, not an established or even an accepted model. The author hopes that his theory will appeal to and influence the changing mind of the present

Footnote 5 (Continued)

(1971); *Graham v. Richardson*, 403 U.S. 365, 372, 91 S. Ct. 1848, 1852 (1971); *United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6, 91 S. Ct. 16, 18 (1970); *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S. Ct. 1153, 1161 (1970); *Turner v. Fouche*, 396 U.S. 346, 362, 90 S. Ct. 532, 541 (1970); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 628, 89 S. Ct. 1886, 1890 (1969); *McDonald v. Board of Election Com'rs. of Chicago*, 394 U.S. 802, 809, 89 S. Ct. 1404, 1408 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S. Ct. 1322, 1331 (1969); *Williams v. Rhodes*, 393 U.S. 23, 51, 89 S. Ct. 5, 21 (1968) (Stewart, J., dissenting); *Rinaldi v. Yeager*, 384 U.S. 305, 311, 86 S. Ct. 1497, 1501 (1966) (Harlan, J., dissenting); *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 752, 84 S. Ct. 1459, 1482 (1964) (Stewart, J., dissenting); *Baker v. Carr*, 369 U.S. 186, 253, 82 S. Ct. 691, 729 (1962) (Clark, J., dissenting).

Court. Apparently, these expectations have not borne fruit: Gunther's theory, written in 1972, has not yet been adopted or even cited by the Supreme Court.⁶ On the other hand, the Supreme Court has often cited *McGowan*, and its progeny (such as *Dandridge v. Williams, supra*),⁷ as controlling any examination

⁶ The only time the article has been cited by the Court was by Justice Marshall, in *San Antonio Independent School District v. Rodriques, supra* at 110, 93 S. Ct. at 1336. There it was cited, not for Gunther's model, but to support the Justice's contention that the Court recently failed to acknowledge the true basis for certain of its more recent decisions.

⁷ At the infancy of the Burger Court, the Court, in *Dandridge v. Williams, supra*, amplified the rationale of *McGowan*. This case by the Burger Court soundly reaffirmed *McGowan* and allied cases:

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S. Ct. 337, 340, 55 L.Ed. 369. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70, 33 S. Ct. 441, 443, 57 L.Ed. 730. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426, 81 S. Ct. 1101, 1105, 6 L.Ed.2d 393.

397 U.S. at 485, 90 S. Ct. at 1161.

of regulations which do not impinge fundamental rights or establish suspect classifications. *Weinberger v. Salfi*, _____ U.S. _____, 95 S.Ct. 2457, 2469 (1975); *Fuller v. State*, 417 U.S. 40, 48, 94 S. Ct. 2116, 2122 (1974); *Hagans v. Levine*, 415 U.S. 528, 541, 94 S. Ct. 1372, 1381 (1974); *Ortwein v. Schwab*, 410 U.S. 656, 660, 93 S. Ct. 1172, 1175 (1973); and *Jefferson v. Hackney*, 406 U.S. 535, 546, 92 S. Ct. 1724, 1731 (1972).⁸ It is patent, after a careful reading of these cases, that *McGowan* and/or *Dandridge* still establish the norm in cases involving economic regulations and stand as palpable evidence of the Court's rejection of Gunther's theory.

Secondly, plaintiffs cite a number of cases set forth in Gunther's article to buttress their contention that the standard is evolving; but these cases are inapposite to the instant case. While the cases cited by plaintiff illustrate situations wherein the Court declared the statute in question unconstitutional, the statutes in those cases were clearly dissimilar to the one at hand — *James v. Strange*, 407 U.S. 128, 92 S. Ct. 2027 (1972) [struck, on equitable grounds, statute allowing state to recover defense costs from indigents]; *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845 (1972) [struck commitment statute for incompetent criminal defendants since no reasonable basis shown]; *Weber v. Aetna Casualty & Surety Co., supra*, [workman's compensation statute denying equal recovery for dependent unacknowledged illegitimates stricken as having no legitimate state interest, compelling or otherwise]; *Humphrey v. Cady*, 405 U.S. 504, 92 S. Ct. 1048 (1972) [remanded for hearing on renewal of commitment pursuant to Sex Crimes Act]; *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029 (1972) [no basis for prohibition of distributing contraceptives to single persons]. *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251 (1971) [arbitrary statutory preference of males as estate administrators].

⁸ See also note 5 *infra* for additional recent citations of Supreme Court cases applying *McGowan* and its progeny.

A perusal of these cases reveals, not a retreat from the rationale of *McGowan* or *Dandridge*, but a judicial recognition of the unusual circumstances presented to the Court in those cases. More importantly, none involve purely economic regulation as the one before this Court. Assuming, *arguendo*, that the Court was fashioning a new intermediate standard somewhere between the rationality test and the compelling interest test, the instant case — a purely economic case — would not fall within the purview of such a rule.⁹

⁹ Even Gunther admits, albeit with restraints, that his theory would not apply to a case such as this:

The means-oriented scrutiny of this model would be applicable to a wide range of statutes, including the social and economic regulatory legislation that has been the most characteristic context for expressions of the hands off attitude of the last generation. The major limitation on the exercise of that scrutiny would stem from particularized considerations of judicial competence, not from broad *a priori* categorizations of the "social and economic" variety. That competence parameter to judicial intervention might be elaborated by refining an observation in Justice Stewart's majority opinion in *Dandridge v. Williams*:

[T]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court . . . [The] Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

Therefore, since the applicable standard for the instant review is provided by *McGowan* and *Dandridge*, this leads to the third and final question — whether the statute satisfies the standard postulated therein. As quoted previously, *McGowan*, *inter alia*, mandates that the constitutionality of a statute turns on there being "any state of facts reasonably . . . conceived to justify it . . ." even if the law "results in some inequality. . . ." 366 U.S. at 425-26, 81 S. Ct. at 1105. Consequently, it is incumbent upon this Court to determine whether the facts illustrate "any conceivable state of facts to justify" Section 105A of the Maryland Code.

At the October trial, plaintiffs' witnesses, in the aggregate, portrayed helpers as mature, knowledgeable, and dedicated workers;¹⁰ they consistently rejected allegations proffered by the defendants that use of apprentices in lieu of helpers either increased safety, improved economy, or improved the product. One such witness, Mr. Albert C. Seeman, President of Association of Builders and Contractors of Maryland, testified that he believed a comparison of the progression of an apprentice and a helper would reveal that for a number of years the helper possesses greater skills. Generally, he testified, three or four

Footnote 9 (Continued)

Justice Stewart's is a justifiable concern when problems are truly "intractable": when the Court cannot confidently assess whether the means contribute to the end because the data are exceedingly technical and complex

Gunther, 86 Harvard L. Rev. at 23-24.

¹⁰ For example, Mr. Wiley Lawhead, International Representative of the Tile Helpers Union, described the average union member as a mature forty-two year old who worked with a high level of proficiency.

years elapsed before the apprentice surpassed the helper in expertise. Therefore, plaintiff contends that during the early years of the worker's vocation the helper would produce a superior product, with more safety. Moreover, plaintiffs proffered testimony that certain jobs, especially in the tile and terrazzo field, were traditionally handled solely by the helper; that neither journeyman nor apprentice were qualified to perform specific aspects of a tile construction job.¹¹

Defendants' witnesses on the other hand, categorically disputed plaintiffs' testimony concerning Section 105A and produced witnesses who testified that the use of apprentices rather than helpers was highly beneficial for numerous reasons. Much of the testimony centered around a comparison of the available formal apprentice instruction programs — union and non-union — with the absolute paucity of formal training available to the helper. The apprentice program was described as requiring attendance at up to two hundred classroom hours for as many as five years, with a comprehensive curriculum designed to examine in depth the multifarious phases and subtleties of the trade.¹²

¹¹ Mr. Charles Habron, a helper of twenty-eight years, testified extensively to the distinctly separate functions and scope of responsibilities of the helper and the journeyman in the tile field. Primarily, he stated, the journeyman's responsibility was to lay the tile, while the helper's was to prepare the materials (mix proportionally, etc.) and to finish the work after the journeyman was finished (grind, polish, etc.).

¹² Mr. Bernard Carpenter, Training Director of the Union Steamfitters Training School in Maryland testified at some length to the training and instruction offered under that program. Though the steamfitting course was somewhat atypical, due to the highly technical nature of that trade, the testimony illustrated the vast training received by apprentices. In that five-year program, the apprentices received two hundred

In essence, defendants' witnesses testified that the end product of these extensive training programs was a well-rounded highly skilled journeyman able to function more efficiently, and more safely, at his trade than his untrained co-worker. The entire thrust of the testimony was that requiring apprenticeship inures to the benefit of all — the worker himself, his co-worker, and society as a whole.

In light of the evidence elicited, it is clear that defendants have satisfied the *McGowan* standard by establishing a set of facts which reasonably justifies the statute. A reasonable conclusion to be drawn from the evidence is that an extensively trained worker, should, on the whole, be a superior, more adept craftsman. The apprentice should be able to perform with more efficacy than the helper whose knowledge is limited by the extent of his on-the-job experiences, since the apprentice has the benefit of similar experiences *plus* knowledge gained in the classroom. Not limited to what he learns by osmosis, the apprentice should be more competent in all branches of the trade and be better able to utilize imagination, ability, and knowledge to produce a better product.

Footnote 12 (Continued)

and sixteen hours of classroom training per year, complemented with no less than sixteen hundred and seventy-five hours of on-the-job training. The array of books and instructional material was impressive, as it delved deeply into all aspects of the trade. Additionally, apprentices are subjected to rigid monthly testing on all phases of their instruction, including safety, and they must maintain a seventy percent average to remain in the program.

Mr. Carpenter's non-union counterpart, Mr. Charles Chamberlain, III, of the Association of Builders and Contractors, offered testimony of the typical non-union apprentice program. The witness described in some depth the four-year plumbing program offered, with its one hundred and forty-four classroom hours and its minimum requirement of two thousand on-the-job training hours per year. As the union apprentice program, this testimony illustrated a high quality program, wherein an apprentice could learn much about his trade.

The testimony and arguments of counsel lead to three legitimate purposes which support the regulation contained in Section 105A:

1. Section 105A promotes a work product produced under safer working conditions.
2. Section 105A enhances the social conditions of the state by reducing unemployment and encouraging helpers to obtain skilled training which will increase their marketability.¹³
3. Section 105A promotes the welfare of the construction industry and the quality of the product by encouraging formalized apprentices training, the results of which are: (a) more skilled craftsmen of all-round competence, (b) more skilled craftsmen who are able to work without close supervision, and (c) more skilled craftsmen who are able to adapt to constantly changing work procedures.

These results, likely to flow from Section 105A, are palpably sufficient to pass *McGowan* scrutiny by clearly offering a legitimate purpose for the statute.

One further note, whether the foregoing results *actually* derive from the statute is irrelevant to the within examination,

¹³ Though not specifically discussed previously, by increasing a worker's skill, the worker should become more marketable, thereby promoting the legitimate State purpose of reducing unemployment, as is alleged by defendants.

for it is not the function of this Court to weigh the statute's effectiveness. As the Supreme Court stated:

We do not inquire whether this statute is wise or desirable, or "whether it is based on assumptions scientifically substantiated." Misguided laws may nonetheless be constitutional. . . . Our task, however is not to weigh this statute's effectiveness but its constitutionality. . . .

James v. Strange, 407 U.S. 128, 132, 92 S. Ct. 2027, 2031 (1972) (Citations omitted and emphasis added).

Since this Court need only find "a conceivable state of facts" in justification of the statute to establish its constitutionality, and three valid justifications have been elicited, we declare Section 105A constitutional. It is a typical state regulatory statute, apparently reasonable, not arbitrary, which has a fair and substantial relation to the object of the legislation with all similarly situated persons being treated alike. *Royster Guano Co. v. Commonwealth*, 253 U.S. 412, 415, 40 S. Ct. 560, 561 (1920). Consequently, since this statute passes constitutional muster, plaintiffs' request for declaratory judgment must be denied.

For the reasons set forth above, IT IS this 6th day of April, 1976, by the United States District Court for the District of Maryland, ORDERED as follows:

1. That plaintiffs' Petition for Declaratory Judgment BE, and the same hereby IS, DENIED.

/s/ Harrison L. Winter,
United States Circuit Judge

/s/ Edward S. Northrop,
Chief United States District
Judge

/s/ R. Dorsey Watkins,
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

HABRON, et al.

v.

EPSTEIN, et al.

Civil Action No. N-74-1214

WATKINS, Senior District Judge, dissenting:

To me, at least, a strong argument can be made that the right to try to earn a living is a fundamental right, associated with the right to the pursuit of happiness. I am persuaded, however, that under currently existing law (although no really comparable case is cited) the courts would probably apply the rationality test to state legislation restricting the availability of employment opportunities. I am also painfully aware of the broad language in *McGowan v. State*, 366 U.S. 420, 425, that:

"... A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

The majority conceive that support may be found for Section 105A in the following "three legitimate purposes" in that it:

1. "[P]romotes a work product produced under safer working conditions."

2. "[E]nhances the social conditions of the state by reducing unemployment and encouraging helpers to obtain skilled training which will increase their marketability."

3. "[P]romotes the welfare of the construction industry and the quality of the product" by encouraging apprentice training resulting in (a) more skilled

all-round competence; (b) more skilled craftsmen able to work without close supervision; and (c) more skilled craftsmen able to adapt to changing work procedures.

While I recognize that the function of the court is not to weigh a statute's effectiveness (*James v. Strange*, 407 U.S. 128, 133), its considerations "must be something more than an ingenious academic exercise in the conceivable." *United States v. Scrap*, 412 U.S. 669, 688-689.¹ I believe that the "conceptions" relied upon by the majority are, at the best, false pregnancies.

1. Safety.

(a) The Act itself, in addition to the absence of any reference to safety, contains self-destructive language with respect thereto.

(i) If safety is involved, why does the Act:

Not apply to public work jobs not exceeding \$500,000;

¹ See, also, *Yick Wo v. Hopkins*, 118 U.S. 356, cited in *Kotch v. Pilot Commissioners*, 330 U.S. 552, 557 that a law is to be "tested by the language of the law there considered and the administration there shown."

Railway Express v. New York, 336 U.S. 106, 110:

"... It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered..."

Not apply to private construction, eight times greater than the covered public work.

If safety were a factor why does not the Act apply to all construction, protecting the construction workers, and the public (or private persons) using, or exposed to this "unsafe" construction.

(ii) The Commissioner of Labor and Industry testified that Section 105A² did not refer to safety, and that 105A was not needed for safety.

He further testified that helpers had been entirely satisfactory before the passage of 105A.

(iii) The Chief Construction Engineer and Inspector of Building Construction of the State of Maryland testified that he personally inspected 75% of building construction (other than schools), including pre and post-105A construction, and public works under \$500,000, and that the relative quality was "pretty uniform."

2. Reduce unemployment and encourage skilled training.

The effect of the Act is to increase unemployment, or to force the helper to work as a laborer. The testimony was uncontradicted that the average age of helpers was 42 years, and that the average age of apprentices was 23. The testimony also established that while a person over 30 might become an apprentice, this was exceptional, and the effort was to "try to hold down" to preferably 24 years.

² He further testified that 105A was not a "Department Bill," and that it was unfavorably reported by the Committee to which it had been referred.

It also was established that at least in the Terrazzo, Marble and Tile setting trade, some work could be done *only* by helpers; that mechanics were not allowed to do this type of work.

It was also established that some helpers do become journeymen.

3. Welfare of the industry and quality of the product.

Before considering the three subdivisions of this concept, it would seem almost conclusive against its validity to point out that the first witness called by defendants, the Training Director of the Steamfitters' Union, in response to a question as to whether he was familiar with Section 105A answered in the affirmative, and added that he was in favor of doing away with it.

Considering the majority concepts in *ONCE*:

Promoting the welfare of the construction industry and the quality of the product by encouraging apprentice training.

The Commissioner of Labor testified that there was no basis for believing that elimination of helpers will improve the quality of work in public projects.

As noted above, the Chief Building Inspector testified that the relative quality of work before and after 105A, and on public works not exceeding \$500,000, was pretty uniform.

Despite the fallacy of the major premise of promoting welfare in the construction industry, and quality of the product, a brief consideration must be given to the alleged benefits of encouraging apprenticeship training.

(a) More skilled all-around competence.

Perhaps after four years the all-around competence of an apprentice may exceed that of a

helper. However, the competence of a helper was satisfactory in all construction before 105A, and is still satisfactory on public works not in excess of \$500,000, and on all private construction.

(b) More skilled craftsmen able to work without close supervision.

The evidence was undisputed that the helper works behind his mechanic and "is told *what* to do, and *does it*." (Emphasis supplied). The apprentice watches the journeyman and tries to learn what he does and how. At least at first the apprentice does less work on the job than a helper.

(c) More skilled craftsmen able to adapt to changing work procedures.

There was no evidence, offered or suggested, that helpers were not at least adaptable to changes.

To me 105A unnecessarily and unfairly discriminates against helpers. It has no fair and substantial relation to the (undisclosed) object of the legislation, or even to the concepts sought to be conjured up by the majority.

I, therefore, respectfully dissent.

/s/ R. Dorsey Watkins,

Filed: April 6, 1976.

APPENDIX B

MARYLAND STATUTE INVOLVED

Article 100, Section 105A, Annotated Code of Maryland, 1957 Edition, 1964 Replacement Volume, 1975 Cumulative Supplement at pages 69 and 70 of the Cumulative Supplement.

§ 105A. Employment of apprentices.

No person classified as a helper or trainee shall be employed on public works. Only apprentices in a trade, craft or occupation for which an apprenticeship program has been approved by the apprenticeship and training council of the Department of Licensing and Regulation shall be employed on public works. Each apprentice employed on a public works shall be paid not less than the percentages, as set forth in such approved apprenticeship program, of the journeyman mechanic's prevailing hourly rate of wages as determined by the Commissioner of Labor and Industry for such journeyman mechanic in the trade, craft or occupation in which the apprentice is employed on the public works. (1973, ch. 733.)

Editor's note. — Section 2, ch. 733, Acts 1973, provides that the act shall take effect July 1, 1973.

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APPENDIX C

NOTICE OF APPEAL
(Filed May 4, 1976)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHARLES HABRON, ET. AL.,
Plaintiffs,

v.

HARVEY A. EPSTEIN, ET. AL.,
Defendants,

CIVIL ACTION NO. N-74-1314

Notice is hereby given that Walter Hawse and John Sigler, Jr., Plaintiffs, hereby appeal to the United State's Supreme Court from the Order of the Three-Judge Court entered in this action on April 7, 1976.

JOHN J. BISHOP, JR.
600 East Joppa Road
Towson, Maryland 21204
Attorney for Plaintiffs

I HEREBY CERTIFY this 4th day of May, 1976, that a copy of the foregoing Notice of Appeal was mailed to Robert J. Aumiller, Esq., Assistant Attorney General, 203 E. Baltimore Street, Baltimore, Maryland 21201 and to Peter G. Angelos, Esq., 233 Equitable Building, Baltimore, Maryland 21201, Attorneys for the Defendants.

JOHN J. BISHOP, JR.,

A. 29

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHARLES HABRON, ET. AL.,
Plaintiffs,

v.

HARVEY A. EPSTEIN, ET. AL.,
Defendants,

CIVIL ACTION NO. N-74-1314

NOTICE OF APPEAL
(Filed May 7, 1976)

Notice is hereby given that Charles Habron, Rudy Spencer, Frank Glorioso and William Esch, Plaintiffs, hereby appeal to the United State's Supreme Court from the Order of the Three-Judge Court entered in this action on April 7, 1976.

JOHN J. BISHOP, JR.
600 East Joppa Road
Towson, Maryland 21204
Attorney for Plaintiffs

I HEREBY CERTIFY this 6th day of May, 1976, that a copy of the foregoing Notice of Appeal was mailed to Robert J. Aumiller, Esq., Assistant Attorney General, 203 E. Baltimore Street, Baltimore, Maryland 21201 and to Peter G. Angelos, Esq., 233 Equitable Building, Baltimore, Maryland 21201, Attorneys for the Defendants.

JOHN J. BISHOP, JR.,

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1913

**CHARLES HABRON; WILLIAM ESCH;
FRANK GLORIOSO; RUDY SPENCER;
JOHN SIGLER, JR.; AND WALTER HAWSE,**

Appellants,

v.

**HARVEY A. EPSTEIN, COMMISSIONER OF LABOR AND
INDUSTRY OF THE STATE OF MARYLAND; AND
BALTIMORE BUILDING AND CONSTRUCTION
TRADES COUNCIL,**

Appellees.

**ON APPEAL FROM A DECISION OF A
THREE JUDGE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

MOTION TO AFFIRM

**FRANCIS B. BUREH,
Attorney General,
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**FRANCIS X. PUGH,
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One South Calvert Street,
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Counsel for Appellee,
Harvey A. Epstein,
Commissioner of Labor
and Industry of the
State of Maryland.**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1913

CHARLES HABRON; WILLIAM ESCH;
FRANK GLORIOSO; RUDY SPENCER;
JOHN SIGLER, JR.; AND WALTER HAWSE,

Appellants,

v.

HARVEY A. EPSTEIN, COMMISSIONER OF LABOR AND
INDUSTRY OF THE STATE OF MARYLAND; AND
BALTIMORE BUILDING AND CONSTRUCTION
TRADES COUNCIL,

Appellees.

ON APPEAL FROM A DECISION OF A
THREE JUDGE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

The Appellee, Harvey A. Epstein, Commissioner of Labor and Industry of the State of Maryland, pursuant to Rule 16 of the United States Supreme Court, moves this Honorable Court to affirm the final judgment and decree of the district court upon the grounds that the issues raised by the Appellants do not amount to a substantial federal question and that further argument in this matter is not necessary.

STATEMENT OF THE CASE

In 1969, the Maryland Legislature enacted the "Contracts For Public Works Law", which is presently codified in Article 100, Section 96 *et. seq.* of the Annotated Code of Maryland (1964 Replacement Volume, 1975 Cumulative Supplement). Thereafter, in 1973, the Legislature amended that statute by adding Section 105A entitled "Employment of Apprentices" which became effective July 1, 1973. Section 105A specifically precludes the use of "helpers" on all State public works projects:

"No person classified as a helper or trainee shall be employed on public works. Only apprentices in a trade, craft or occupation for which an apprenticeship program has been approved by the apprenticeship and training council of the Department of Licensing and Regulation shall be employed on public works. Each apprentice employed on a public works shall be paid not less than the percentages, as set forth in such approved apprenticeship program, of the journeyman mechanic's prevailing hourly rate of wages as determined by the Commissioner of Labor and Industry for such journeyman mechanic in the trade, craft or occupation in which the apprentice is employed on the public works."

The Appellants, Charles Habron, William Esch, Frank Glorioso, Rudy Spencer, John Sigler, and Walter Hawse, instituted this action in the United States District Court for the District of Maryland on November 27, 1974 by filing a Complaint and Petition for Declaratory Decree and Motion to Convene a Three-Judge Court, challenging the constitutionality of Section 105A insofar as that statute prohibited them, in their capacity as helpers, from working on public works projects in the State of Maryland. Thereafter, on or about December 12, 1974, the Appellants, with the

consent of the Appellee, Harvey A. Epstein, filed an Amended Bill of Complaint and Petition for Declaratory Decree requesting injunctive relief from the enforcement of Section 105A. In their complaint, the Appellants contended that as a result of the enactment and enforcement of Section 105A, they "will continue to be deprived from working on public works projects of the State of Maryland thereby impairing their ability to earn their livings and support themselves and their families . . .". To date, the Appellants have suffered no monetary loss as a result of the enactment of Section 105A but assert that the helper prohibition could cause them monetary losses in the future. See Stipulation of Facts, Paragraphs 1-6 (Docket No. 37).

The Appellee, Harvey A. Epstein, is Commissioner of Labor and Industry for the State of Maryland and is charged under the "Contracts For Public Works Law" with the enforcement and administration of Section 105A.

The Appellee, The Baltimore Building and Construction Trades Council, was granted leave to intervene in these proceedings as a Defendant after the district court found that the Council had a substantial interest in the subject matter of the proceeding. The membership of the Council is composed of numerous construction trade unions located in the State of Maryland whose programs and policies the Council implements, organizes and supports. One such program has been the implementation of apprenticeship training for its members.

On or about April 21, 1975, the International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile Helpers and Finishers,

Marble Setters Helpers, Marble Mosiac and Terrazzo Workers Helpers was granted leave to intervene as plaintiffs to this proceeding.

In a Stipulation of Facts filed by all parties to this proceeding, it was stipulated and agreed upon that "apprentices and helpers are two distinct types of workmen, with different job descriptions and different training programs". See Stipulation of Facts, Paragraph 9 (Docket No. 37). This basic occupational distinction is clearly borne out in the occupational definitions of "helper" and "apprentice" contained in the *Dictionary of Occupational Titles* published by the U.S. Department of Labor, which were made a part of the Stipulation of Facts:

"Helper (any ind.). A worker who assists another worker, usually of a higher level of competence or expertness, by performing a variety of duties, such as furnishing another worker with materials, tools, and supplies; cleaning work area, machines, and equipment; feeding or off-bearing machine; holding materials or tools; and performing other routine duties. A HELPER may learn a trade but does so on his own without an agreement with his employer that such is the purpose of their relationship. Consequently, the title HELPER is some times used as synonym for APPRENTICE, a practice that is incorrect technically. A worker whose duties are limited or restricted to one type of activity, such as moving materials from one department to another, feeding machines, removing products from conveyors or machines, or cleaning machines or work areas is not technically a HELPER and is classified according to duties performed as MATERIAL HANDLER; MACHINE CLEANER; PORTER II. A worker who performs a variety of duties to assist another worker is a HELPER technically and is classified according to worker assisted as BRICKLAYER HELPER (const.); DRYCLEANER HELPER (clean., dye., & press.)

"Apprentice (any ind.). A worker who learns, according to a written or oral contractual agreement, a recognized skilled craft or trade requiring two or more years of on-the-job training through job experience supplemented by related instruction, prior to time that he may be considered a qualified skilled worker. APPRENTICES are seldom over 30 years of age. High school or vocational school education is generally a prerequisite for entry into an apprenticeship program. Provisions of apprenticeship agreement regularly include length of apprenticeship; a progressive scale of wages; work processes to be taught; and amount of instruction in subjects related to the craft or trade, such as characteristics of materials used, selected shop mathematics, and blueprint reading. Apprenticeship of a particular craft or trade is best evidenced by its acceptability for registration as a trade by a State apprenticeship agency or the Federal Bureau of Apprenticeship and Training. Generally, where employees are represented by a union, apprenticeship programs come under the guidance of joint apprenticeship committees composed of representatives of the employers or the employer association and representatives of the employees. These committees may determine need for APPRENTICES in a locality and establish minimum apprenticeship standards of education, experience and training. In instances where committees do not exist, apprenticeship agreement is made between APPRENTICE and employer, or an employer group. The title, APPRENTICE, is often loosely used as a synonym for beginner, HELPER, or LEARNER. This practice is technically incorrect and leads to confusion in determining what is meant. Typical classifications for APPRENTICES are BLACKSMITH APPRENTICE (forging); MACHINIST APPRENTICE (mach. shop); PLUMBER APPRENTICE (const.)."

A statutory three-judge court having been convened, an evidentiary hearing was held on November 20 and

21, 1975, wherein all parties to the proceeding presented evidence concerning the enforcement and implementation of Section 105A.

On April 6, 1976, the Court issued its Opinion and Order dismissing the Appellants' Petition for Declaratory Judgment.

On May 4, 1976, the Appellants, Walter Hawse and John Sigler, Jr., filed an appeal to this Court from the Order of the Three-Judge Court entered on April 7, 1976. Thereafter, on May 6, 1976, the Appellants, Charles Habron, Rudy Spencer, Frank Glorioso, and William Esch filed an appeal to this Court from that same Order. The Plaintiff, the International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile Helpers and Finishers, Marble Setters Helpers, Marble Mosiac and Terrazo Workers Helpers has not appealed that Order.

On July 2, 1976, the Appellants filed a jurisdictional statement with this Honorable Court.

ARGUMENT

In the course of its equal protection analysis, the district court, relying upon substantial case law, concluded that the right to seek employment, unfettered by governmental regulation, was neither a fundamental right nor an area of suspect classification. Recognizing that the courts have never subjected purely economic legislation to the "strict scrutiny" or "compelling state interest" standard of review, that court applied the "lower scrutiny" or "rational basis" test in its analysis. See for example, *Two Guys from Harrison — Allentown, Inc., v. McKinley*, 366 U.S. 582, 81 S. Ct. 1135 (1960); *Allied Stores of Ohio v. Bowers*, 358 U.S. 622,

79 S. Ct. 488; *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 69 S. Ct. 463 (1948); *Lindsley v. Natural Carbonics Gas Company*, 220 U.S. 61, 31 S. Ct. 337 (1910); *Snell v. Wyman*, 281 F. Supp. 853, 867, affirmed., 393 U. S. 223, 89 S. Ct. 553 (1968). As an additional basis for the application of the "rational basis" analysis, the lower court relied upon numerous cases which had applied that standard of review to state economic legislation which placed limitations on the availability of employment opportunities. *Goesaert v. Cleary*, 335 U.S. 464, 69 S. Ct. 198 (1948); *Kotch v. Board of Riverport Pilot Commissioners*, 330 U. S. 552, 67 S. Ct. 910 (1947); *Flemming v. Nestor*, 363 U. S. 603, 80 S. Ct. 1367 (1959), reh. den. 364 U. S. 864, 81 S. Ct. 29 (1960).

Having determined that the "rational basis" test was the applicable standard of review, all three judges of the district court, in their search for the most fully developed and formulated pronouncement of that test, turned to *McGowan v. Maryland*, 366 U.S. 420, 81 S. Ct. 1101 (1961):

"Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. *A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.*" *Id.* at 425, and 1105 (Emphasis added).

The vitality of the *McGowan* test remains unchallenged. See *Weinberger v. Salfi*, — U.S. —, 95 S. Ct. 2457, 2469 (1975); *Fuller v. Oregon*, 417 U.S. 40, 48, 94 S. Ct. 2116, 2122 (1974); *Hagans v. Levine*, 415 U.S. 528, 541, 94 S. Ct. 1372, 1381 (1974); *Ortwein v. Schwab*, 410 U.S. 656, 660, 93 S. Ct. 1172, 1175 (1973); *Jefferson v. Hackney*, 406 U.S. 535, 546, 92 S. Ct. 1724, 1731 (1972); reh. den. 409 U.S. 898, 93 S. Ct. 178 (1973); *Sayler Land Company v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 93 S. Ct. 1224 (1973); *Hooban v. Boling*, 503 F.2d 648, cert. denied 461 U.S. 920 (1975); *Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153 (1970); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 51, 93 S. Ct. 1278 (1973); and *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 89 S. Ct. 1404 (1969).

Of the aforementioned citations, *Dandridge v. Williams*, *supra*, in reaffirming the *McGowan* doctrine, most clearly set out the principles of analysis to be utilized in the area of economic and social welfare regulation:

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S. Ct. 337, 340, 55 L. Ed. 369. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70, 33 S. Ct. 441, 443, 57 L. Ed. 730. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan v. Maryland*, 366

U.S. 420, 426, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393." 397 U.S. at 485, 90 S. Ct. at 1161.

See also *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 93 S. Ct. 2821 (1973).

The district court, after a consideration of the extensive testimony and arguments presented by the parties to this proceeding, found that Section 105A served three legitimate purposes of the State of Maryland:

- "1. Section 105A promotes a work product produced under safer working conditions.
2. Section 105A enhances the social conditions of the state by reducing unemployment and encouraging helpers to obtain skilled training which will increase their marketability.
3. Section 105A promotes the welfare of the construction industry and the quality of the product by encouraging formalized apprentices training the results of which are: (a) more skilled craftsmen of all-round competence, (b) more skilled craftsmen who are able to work without close supervision, and (c) more skilled craftsmen who are able to adapt to constantly changing work procedures."

Based upon this finding, the district court concluded that Section 105A was "a typical state regulatory statute, apparently reasonable, not arbitrary, which has a fair and substantial relation to the object of the legislation with all similarly situated persons being treated alike". Indeed, the aforementioned Stipulation regarding the differences between the "apprentice" and "helper" bears out this conclusion. In view of the legitimate purposes found to be served by the statute, the court declared that Section 105A passes constitutional muster under the "low scrutiny" or "rational

basis" analysis as set out in *McGowan*. The Appellees assert that in view of these findings, Section 105A would have passed constitutional muster under the "strict scrutiny" or "compelling state interest" analysis if an infringement of a fundamental right or the establishment of a suspect classification existed.

The Appellants set out various reasons why they alleged that a substantial federal question has been raised by this appeal and yet are unable to point out any error in the lower court's equal protection analysis. Instead, the Appellants allege that the issue raised in this appeal is of great national importance and yet are unable to cite the enactment of any identical legislation by any of the other states. Of more importance is the fact that the constitutionality of such legislation, if found to exist, would be unquestioned due to the legitimate state interests served by such legislation. The Appellants further argue that the decision of the district court was in some way arbitrary and that the statute is unconstitutional, claiming that the basis for the prohibition of the use of helpers on public works projects is the cost of the project. The Appellees submit that the basis for the implementation of Section 105A is not the cost but the public nature of the project to be constructed.

The Appellants have also alleged that the statute is discriminatory against workers over thirty (30) years of age and yet provide no evidence to substantiate this allegation. On the contrary, there is absolutely no indication, either within the plain meaning of the words of the statute or as a result of the implementation or enforcement of the statute, to substantiate this claim.

Finally, the Appellants urge this Honorable Court to carefully scrutinize this statute since it prohibits employment in Maryland and therefore cripples the "country's economic stability". This unsubstantiated allegation is in direct opposition to the factual findings made in this case by the district court. On page 21 of their Opinion, the district court specifically found that "Section 105 enhances the social conditions of the State by *reducing unemployment* and encouraging helpers to obtain skilled training which will increase their marketability." (Emphasis supplied). The Appellees find it hard to understand this assertion of the Appellants in view of the fact that the Appellants have stipulated that they have suffered no monetary loss as a result of the enactment of Section 105A.

In view of the legitimate State interests served by Section 105A and the in depth constitutional analysis undertaken by the district court, and in view of the numerous pronouncements regarding the constitutionality of economic regulation by this Honorable Court, it is respectfully submitted that the Appellants have not raised a substantial federal question and the decision of the lower court should, therefore, be affirmed.

CONCLUSION

The Appellees respectfully submit that, in the absence of a substantial federal question to be decided, the Judgment and Decree of the District Court should be affirmed.

Respectfully submitted,

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Commissioner of Labor
and Industry of the
State of Maryland.

JUL 30 1976

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1913

**CHARLES HABRON; WILLIAM ESCH;
FRANK GLORIOSO; RUDY SPENCER;
JOHN SIGLER, JR.; and WALTER HAWSE,**
Appellants,

v.

**HARVEY A. EPSTEIN, Commissioner of Labor and
Industry of the State of Maryland; and
BALTIMORE BUILDING AND CONSTRUCTION
TRADES COUNCIL,**

Appellees.

ON APPEAL FROM A DECISION OF THE
THREE JUDGE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

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HARVEY A. EPSTEIN, Commissioner of Labor and
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BALTIMORE BUILDING AND CONSTRUCTION
TRADES COUNCIL,

Appellees.

ON APPEAL FROM A DECISION OF THE
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MOTION TO AFFIRM

MOTION TO AFFIRM

The Appellees, Harvey A. Epstein, Commissioner of Labor and Industry of the State of Maryland and The Baltimore Building and Construction Trades Council, pursuant to Rule 16 of the United States Supreme Court,

move this Honorable Court to affirm the final judgment and decree of the district court upon the grounds that the issues raised by the Appellants do not amount to a substantial federal question and that further argument in this matter is not necessary.

STATEMENT OF THE CASE

In 1969, the Maryland Legislature enacted the "Contracts For Public Works Law", which is presently codified in Article 100, Section 96 *et. seq.* of the Annotated Code of Maryland (1964 Replacement Volume, 1975 Cumulative Supplement). Thereafter, in 1973, the Legislature amended that statute by adding Section 105A entitled "Employment of Apprentices" which became effective July 1, 1973. Section 105A specifically precluded the use of "helpers" on all State public works projects:

"No person classified as a helper or trainee shall be employed on public works. Only apprentices in a trade, craft or occupation for which an apprenticeship program has been approved by the apprenticeship and training council of the Department of Licensing and Regulation shall be employed on public works. Each apprentice employed on a public works shall be paid not less than the percentages, as set forth in such approved apprenticeship program, of the journeyman mechanic's prevailing hourly rate of wages as determined by the Commissioner of Labor and Industry for such journeyman mechanic in the trade, craft or occupation in which the apprentice is employed on the public works."

The Appellants, Charles Habron, William Esch, Frank Glorioso, Rudy Spencer, John Sigler, and Walter Hawse, instituted this action in the United States District Court for the District of Maryland on November 27, 1974 by filing a Complaint and Petition for Declaratory Decree and Motion to Convene a Three-Judge Court, challenging the constitutionality of Section 105A insofar as that statute prohibited them in their capacity as helpers, from working on public works projects in the State of Maryland. Thereafter, on or about December 12, 1974, with the consent of the Appellee, Harvey A. Epstein, filed an Amended Bill of Complaint and Petition for Declaratory Decree requesting injunctive relief from the enforcement of Section 105A. In their complaint, the Appellants contended that as a result of the enactment and enforcement of Section 105A, they "will continue to be deprived from working on public works projects of the State of Maryland thereby impairing their ability to earn their livings and support themselves and their families...". To date, the Appellants have suffered no monetary loss as a result of the enactment of Section 105A but assert that the helper prohibition could cause them monetary losses in the future. See Stipulation of Facts, Paragraphs 1-6. (Docket No. 37).

The Appellee, Harvey A. Epstein, is Commissioner of Labor and Industry for the State of Maryland and is charged under the "Contracts For Public Works Law" with the enforcement and administration of Section 105A.

The Appellee, The Baltimore Building and Construction Trades Council, was granted leave to intervene in these proceedings as a Defendant after the District Court found that the Council had a substantial interest in the subject

matter of the proceeding. The membership of the Council is composed of numerous construction trade unions located in the State of Maryland whose programs and policies the Council implements, organizes and supports. One such program has been the implementation of apprenticeship training for its members.

On or about April 21, 1975, the International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile Helpers and Finishers, Marble Setters Helpers, Marble Mosaic and Terrazzo Workers Helpers were granted leave to intervene as plaintiffs to this proceeding.

In a Stipulation of Facts filed by all parties to this proceeding, it was stipulated and agreed upon that "apprentices and helpers are two distinct types of workmen, with different job descriptions and different training programs". See Stipulation of Facts, Paragraph 9. (Docket No. 37). This basic occupational distinction is clearly borne out in the occupational definitions of "helper" and "apprentice" contained in the *Dictionary of Occupational Titles* published by the U.S. Department of Labor, which were made a part of the Stipulation of Facts:

"HELPER (any ind.). A worker who assists another worker, usually of a higher level of competence or expertness, by performing a variety of duties, such as furnishing another worker with materials, tools, and supplies; cleaning work area, machines, and equipment; feeding or off-bearing machine; holding materials or tools; and performing other routine duties. A HELPER may learn a trade but does so on his own without an agreement with his employer that such is the purpose of their relationship. Consequently, the

title HELPER is some times used as synonym for APPRENTICE, a practice that is incorrect technically. A worker whose duties are limited or restricted to one type of activity, such as moving materials from one department to another, feeding machines, removing products from conveyors or machines, or cleaning machines or work areas is not technically a HELPER and is classified according to duties performed as MATERIAL HANDLER: MACHINE CLEANER: PORTER II. A worker who performs a variety of duties to assist another worker is a HELPER technically and is classified according to worker assisted as BRICKLAYER HELPER (const.); DRYCLEANER HELPER (clean., dye., & press.)"

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union, apprenticeship programs come under the guidance of joint apprenticeship committees composed of representatives of the employers or the employer association and representatives of the employees. These committees may determine need for APPRENTICES in a locality and establish minimum apprenticeship standards of education, experience and training. In instances where committees do not exist, apprenticeship agreement is made between APPRENTICE and employer, or an employer group. The title, APPRENTICE, is often loosely used as a synonym for beginner, HELPER, or LEARNER. This practice is technically incorrect and leads to confusion in determining what is meant."

A statutory three-judge court having been convened, an evidentiary hearing was held on November 20 and 21, 1975, wherein all parties to the proceeding presented evidence concerning the enforcement and implementation of Section 105A.

On April 6, 1976, the Court issued its Opinion and Order dismissing the Appellants' Petition for Declaratory Judgment.

On May 4, 1976, the Appellants, Walter Hawse and John Sigler, Jr., filed an appeal to this Court from the Order of the Three-Judge Court entered on April 7, 1976. Thereafter, on May 6, 1976, the Appellants, Charles Habron, Rudy Spencer, Frank Glorioso, and William Esch filed an appeal to this Court from that same Order. The Plaintiff, the International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile Helpers and Finishers, Marble Setters Helpers, Marble Mosaic and Terrazo Workers Helpers has not appealed that Order.

On July 2, 1976, the Appellants filed a jurisdictional statement with this Honorable Court.

ARGUMENT

In the course of its equal protection analysis, the district court, relying upon substantial case law, concluded that the right to seek employment, unfettered by governmental regulation, was neither a fundamental right nor an area of suspect classification. Recognizing that the courts have never subjected purely economic legislation to the "strict scrutiny" or "compelling state interest" standard of review, that court applied the "lower scrutiny" or "rational basis" test in its analysis. See for example, *Two Guys from Harrison - Allentown, Inc., v. McKinley*, 336 U.S. 582, 81 S. Ct. 1135 (1960); *Allied Stores of Ohio v. Bowers*, 358 U.S. 622, 528, 79 S. Ct.; *Railway Express Agency, Inc., v. New York*, 336 U.S. 106, 110, 69, S. Ct.; *Lindsley v. Natural Carbonics Gas Company*, 220 U.S. 61, 78 - 79, 31 S. Ct. 37, 340-41 (1910); *Snell v. Wyman*, 281 F. Supp. 853, 867, affirmed., 393 U.S. 223, 89 S. Ct. 553 (1968). As an additional basis for the application of the "rational basis" analysis, the lower court relied upon numerous cases which had applied that standard of review to state economic legislation which placed limitations on the availability of employment opportunities. *Goesaert v. Cleary*, 335 U.S. 464, 69 S. Ct. 198 (1948); *Kitch v. Board of Riverport Pilot Commissioners*, 330 U.S. 552, 67 S. Ct. 910 (1947); *Flemming v. Nestor*, 363 U.S. 603, 80 S. Ct. 1367 (1959).

Having determined that the "rational basis" test was the applicable standard of review, all three judges of the district court, in their search for the most fully developed

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"Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their law result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Id. at 425, and 1105 (Emphasis added).

The vitality of the *McGowan* test remains unchallenged. See *Weinberger v. Salfi*, U.S. , 95 S. Ct. 2457, 2469 (1975); *Fuller v. State*, 417 U.S. 40, 48, 94 S. Ct. 2116, 2122 (1974); *Hagans v. Levine*, 415 U.S. 528, 541, 94 S. Ct. 1372, 1381 (1974); *Ortwein v. Schwab*, 410 U.S. 656, 660, 93 S. Ct. 1172, 1175 (1973); *Jefferson v. Hackney*, 406 U.S. 535, 546, 92 S. Ct. 1724, 1731 (1972); *Sayler Land Company v. Tulare Lake Basin Water Storage District*, 410 U.S. 19, S. Ct. 1224 (1973); *Hooban v. Boling*, 503 F.2d 642, cert. denied 461 U.S. 920 (1975); *Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 153 (1970); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 51, 93 S. Ct. 1278 (1973).

Of the aforementioned citations, *Dandridge v. Williams*, *supra*, in reaffirming the *McGowan* doctrine, most clearly set out the principles of analysis to be utilized in the area of economic and social welfare regulation:

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S. Ct. 337, 340, 55 L. Ed. 369. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70, 33 S. Ct. 441, 443, 57 L. Ed. 730. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan v. Maryland*, 366 U.S. 420, 426, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393."

397 U.S. at 485, 90 S. Ct. at 1161. See also *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 93 S. Ct. 2821 (1973).

The district court, after a consideration of the extensive testimony and arguments presented by the parties to this proceeding, found that Section 105A served three legitimate purposes of the State of Maryland:

"1. Section 105A promotes a work product produced under safer working conditions.

2. Section 105A enhances the social conditions of the state by reducing unemployment and encouraging helpers to obtain skilled training which will increase their marketability.

3. Section 105A promotes the welfare of the construction industry and the quality of the product by encouraging formalized apprentices training the results of which are: (a) more skilled craftsmen of all-round competence, (b) more skilled craftsmen who are able to work with close supervision." ...

Based upon these findings, the district court concluded that Section 105A was "a typical state regulatory statute, apparently reasonable, not arbitrary, which has a fair and substantial relation to the object of the legislation with all similarly situated persons being treated alike." In view of the legitimate purposes found to be served by the statute, the court declared that Section 105A passes constitutional muster under the "low scrutiny" or "rational basis" analysis as set forth in *McGowan*. The Appellees assert that in view of these findings, Section 105A would have passed constitutional muster under the "strict scrutiny" or "compelling state interest" analysis if an infringement of a fundamental right or the establishment of a suspect classification existed.

The Appellants set out various reasons why they alleged that a substantial federal question has been raised by this appeal and yet are unable to point out any error in the lower court's equal protection analysis. Instead, the Appellants allege that the issue raised in this appeal is of great national importance and yet are unable to cite the enactment of any identical legislation by any of the other

states. Consequently, the Appellants argue that the district court decision will open the door to the passage of helper legislation in other states and yet are unable to show the existence of similar legislation in any of the other States. Of more importance, is the fact that the constitutionality of such legislation, if found to exist, would be unquestioned due to the legitimate state interests served by such legislation. The Appellants further argue that the decision of the district court was in some way arbitrary and that the statute is unconstitutional, claiming that the basis for the prohibition of helpers on public works projects is the cost of the project. The Appellees submit that the basis for the implementation of Section 105A is not the cost but the public nature of the project to be constructed.

The Appellants have also alleged that the statute is discriminatory against workers over thirty (30) years of age and yet provide no evidence to substantiate this allegation. On the contrary, there is absolutely no indication, either within plain meaning of the words of the statute, or as a result of the implementation or enforcement of the statute, to substantiate this claim.

Finally, the Appellants urge this Honorable Court to carefully scrutinize this statute since it prohibits employment in Maryland and therefore cripples the "country's economic stability". This unsubstantiated allegation is in direct opposition to the findings made in this case by the district court. On page 21 of their Opinion, the district court specifically found that "Section 105 enhances the social conditions of the State by *reducing unemployment* and encouraging helpers to obtain skilled training which will increase their marketability." (Emphasis

supplied). The Appellees find it hard to understand this assertion of the Appellants' in view of the fact that the Appellants have stipulated that they have suffered no monetary loss as a result of the enactment of Section 105A.

In view of the legitimate State interests served by Section 105A and the in-depth constitutional analysis undertaken by the district court, and in view of the numerous pronouncements regarding the constitutionality of economic regulation by this Honorable Court, it is respectfully submitted that the Appellants have not raised a substantial federal question and the decision of the lower court should, therefore, be affirmed.

CONCLUSION

The Appellees respectfully submit that, in the absence of a substantial federal question to be decided, the Judgment and Decree of the District Court should be affirmed.

Respectfully submitted,

PETER G. ANGELOS,

Attorney for Appellee

Baltimore Building and
Construction Trades Council

Supreme Court, U. S.
FILED

SEP 27 1976

MICHAEL ROBAX, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 75-1913

CHARLES HABRON; WILLIAM ESCH;
FRANK GLORIOSO; RUDY SPENCER;
JOHN SIGLER, JR.; and WALTER HAWSE,
Appellants,

v.

HARVEY A. EPSTEIN, Commissioner of Labor and
Industry of the State of Maryland; and
BALTIMORE BUILDING AND CONSTRUCTION
TRADES COUNCIL, *Appellees.*

ON APPEAL FROM A DECISION OF THE
THREE JUDGE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RESPONSE TO MOTIONS TO AFFIRM

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On May 4, 1976, Appellants, Walter Hawse and John
Sigler, Jr. filed an appeal to this Court. On May 6, 1976,
Appellants, Charles Habron, Rudy Spencer, Frank Gloriosio

and William Esch likewise filed an appeal to this Court. On July 2, 1976, the Appellants filed a jurisdictional statement with this Honorable Court.

On July 30, 1976, Appellee, Baltimore Building and Construction Trades Council, filed a Motion to Affirm the decision of the Three-Judge Court entered on April 7, 1976. On August 2, 1976, Appellee, Harvey A. Epstein, filed a Motion to Affirm the April 7, 1976 Order. Pursuant to Rule 16 of the United States Supreme Court, Appellants hereby respond to said Motions to Affirm.

STATEMENT OF THE CASE

This has been adequately set forth in Appellants' Jurisdictional Statement and in Appellees' Motion to Affirm.

QUESTION PRESENTED

Do the issues raised by Appellants amount to a substantial federal question so that further argument before this Honorable Court is necessary?

ARGUMENT

MARYLAND ANNOTATED CODE, ART. 100, § 105A, DENIES EQUAL PROTECTION OF THE LAW TO A PERSON CLASSIFIED AS A HELPER BY PROHIBITING HELPERS FROM BEING EMPLOYED IN PUBLIC WORK PROJECTS VALUED OVER \$500,000.

The district court utilized the "rational basis" test for equal protection cases in determining that § 105A was not

unconstitutional. The court formulated that test primarily in terms of the language of *McGowan v. Maryland*, 366 U.S. 420 (1961):

The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

366 U.S. at 425-26. This broad language is nonetheless tempered by admonitions that a court's considerations in equal protection cases "must be something more than an ingenious academic exercise in the conceivable." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688-89 (1973). Or, as this Court stated only last term:

[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.

Weinberger v. Wisenfeld, U.S. , 95 S. Ct. 1225, 1233 (1975). Further, this Court,

need not equal protection cases accept at face value assertions of legislative purpose, when an examination of the legislative scheme and its history demonstrate that the asserted purposes could not have been a goal of the legislation.

95 S. Ct. at 1233, n. 16.

The district court read *McGowan* in its very broadest sense in finding at least three rational purposes for § 105A: (1) that it promoted work safety; (2) that it prevented unemployment and encouraged skilled training; and (3) that it aided apprentice programs. Only under the broadest construction of *McGowan* could the court reach those conclusions. When *McGowan* is tempered by *Weinberger*, it is evident that none of the asserted purposes are anything more than "a mere recitation of . . . benign, compensatory purpose[s]"

According to the testimony of appellee at trial in the district court, the adoption of § 105A was precipitated by an incident in Anne Arundel County, Maryland, where a school was constructed with an inordinate number of helpers versus carpenters. (A helper's primary function is to assist skilled laborers under those laborers' directions.) Appellee stated that the situation mentioned above "was so dramatic that it precipitated the legislation [§ 105A] and all that ensued, and that is probably why we are sitting [in the district court] today." (Transcript of Testimony of Harvey A. Epstein, November 20, 1975, at 14). Yet, in its opinion, the court below did not refer to this incident at all but found three general principles upon which to sustain the constitutionality of the statute.

Appellee's testimony indicates that the purpose of § 105A was to prevent a recurrence of the situation which existed at the Anne Arundel school. To achieve this goal, the legislature excluded all helpers from public works projects valued over \$500,000. This blanket exclusion does not rationally achieve the goal set by the legislature, for instead of regulating the number of helpers who may be

employed in public works projects, § 105A simply prohibits their employment. Thus, the actual effect of the statute bears no relationship to the goal it was designed to achieve.

In this regard, the case at bar is similar to several cases, wherein this Court and other courts, have found state statutes violative of the equal protection clause. In *Morey v. Doud*, 354 U.S. 457 (1957), the Court invalidated an Illinois statute regulating the sale of money orders but exempting money orders sold by the American Express Company from the terms of the statute. The state contended that the law was designed to protect the public, and that the solvency and high financial standing of American Express made the legislative classification reasonable. This Court, however, noted that the statute was intended to be permanent; if American Express became insolvent or lost respectability, it would still be exempt from regulation. Thus, the "remote relationship of the statutory classification to the Act's purposes . . . and the creation of a closed class by the singling out of money orders of a named company, with accompanying economic advantages," made the statute unconstitutional. 354 U.S. at 469.

In the case at bar, not only is the effect of the law not related to the statute's purpose, but also the statute creates a closed class of workers-apprentices who alone may gain employment in public works projects valued over \$500,000. Such a distinction immediately works to the economic advantage of all apprentices, and to the detriment of helpers.

Similarly, in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), this Court struck down a Louisiana

law preventing illegitimate children from recovering workmen's compensation unless the surviving legitimate children did not exhaust the available funds. The Court held that the inferior classification of illegitimate children bore no significant relationship to the purposes of the workmen's compensation statute.

Ruling that a flat ban against employment of a classification of persons was a form of an irrebuttable presumption, and thus constitutionally infirm, the court in *Beazer v. New York Transit Authority*, 399 F. Supp. 1032 (S.D.N.Y. 1975), invalidated the exclusion from any form of employment with defendants of all former heroin addicts participating in methadone maintenance programs, and even former heroin addicts who had successfully concluded their participation in a methadone program. Such a broad, sweeping statute is similar to § 105A, which arbitrarily excludes all helpers from public works projects valued over \$500,000, regardless of their ability, and despite the fact that they had always been qualified for such employment before the passage of the statute. Thus, § 105A constitutes the same kind of flat ban creating an irrebuttable presumption as did the regulation in *Beazer*.

Another "flat ban" was invalidated in *Sugarman v. Dougall*, 413 U.S. 634 (1973), where a New York law provided that only United States citizens could hold permanent positions in the competition class of the state civil service. This Court, holding the statute violative of the equal protection clause, ruled that the restriction "sweeps indiscriminately." 413 U.S. 643. See *Hampton v. Mow Sun Wong*, 44 U.S.L.W. 4737 (U.S. June 1, 1976) (Civil Service Commission regulation barring noncitizens from federal civil

service employment violates due process clause of fifth amendment).

Not only does § 105A constitute an indiscriminate ban against helpers which bears no relation to its actual purpose, the statute also does not support the rationale conceived by the district court to sustain it. In his dissent, Judge Watkins thoroughly debunked the three major conceptions relied upon by the court as rational purposes for § 105A. Judge Watkins noted that safety could not be a rationale for the statute since the act only applies to public works jobs exceeding \$500,000, and does not apply to private construction. Further, the Commissioner of Labor and Industry testified that the statute did not refer to safety, and that the work of helpers was entirely satisfactory. Judge Watkins also pointed out that the claim that the statute reduced unemployment and encouraged skilled training was untenable, since the age of most helpers made it highly unlikely that they would become apprentices. Finally, the fact that the unions themselves opposed the statute undercut the premise that the statute would promote the welfare of the industry. (Dissent of Watkins, J., at 2-5.)

A further attack upon § 105A can be fashioned by considering the basic distinctions between helpers and apprentices. The distinctions are so minimal as to make it difficult to determine any appreciable difference between the two classes. Basically, helpers always remain helpers, assisting skilled laborers, while apprentices train to become skilled laborers by assisting their superiors. This is a minimal distinction at best. Indeed, the two classes appear to be similarly situated, and discrimination between similarly situated classes cannot be sustained.

In *Reed v. Reed*, 404 U.S. 71 (1971), this Court invalidated an Idaho statute giving preference to men over women as administrators of decedents' estates, saying the act violated the fourteenth amendment "[b]y providing dissimilar treatment for men and women similarly situated" 404 U.S. at 77. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), where appellee was convicted for administering contraceptives to an unmarried person, the Court found no rational basis for a statute prohibiting the administration of contraceptives to unmarried persons, but allowing it for married persons. This distinction between similarly situated classifications was thus held to violate the equal protection clause.

Both cases show that, where two classes are substantially similar, discrimination in favor of or against one class is sufficient to violate the fourteenth amendment. Such reasoning, applied to the case at bar, requires that § 105A be held unconstitutional for discriminating in favor of apprentices and against helpers. *Accord*, *Lindsey v. Normet*, 405 U.S. 56 (1972) (double bond requirement for tenants but no other class of appellants violates equal protection).

Appellants are cognizant of several cases holding state statutory classifications permissible under the fourteenth amendment. However, all of the leading cases can be distinguished from the case at bar. In *Kotch v. Board of River Port Pilot*, 330 U.S. 552 (1947), the Court upheld a Louisiana law which, in effect, only permitted friends and relatives of river pilots to become river pilots themselves. The Court in stating its reasons, made clear its decision was limited to the unusual factual situation before it.

[I]t seems to have been accepted at an early date that in pilotage . . . competition for appointment . . . adversely affects the public interest

330 U.S. at 561. Further, "considering the entirely unique institution of pilotage in the light of its history in Louisiana," the Court was compelled to sustain the statute. 330 U.S. at 563.

In *Linehan v. Waterfront Commission*, 116 F. Supp. 683 (S.D. N.Y. 1953), *aff'd*, 347 U.S. 439 (1954), an act of New Jersey and New York required longshoremen to register with, and seek employment through, the Waterfront Commission. In upholding the statute, the district court noted that the act "resulted from the abundant evidence uncovered of grave abuses in the existing system of hiring longshoremen" 116 F. Supp. at 689.

Two other cases can be distinguished by the fact that they relate to economic assistance in the form of Social Security and Aid to Families with Dependent Children (AFDC). Such enormous programs having nationwide implications, require a high degree of government administration and regulation. Thus, in this field, the Court will give the Government greater deference when scrutinizing classifications made for administrative convenience, as it did in *Weinberger v. Salfi*, 422 U.S. 749 (1975), and *Dandridge v. Williams*, 397 U.S. 471 (1970). These cases clearly turned on the "administrative difficulties of individual eligibility determinations," 422 U.S. at 765, and the relaxed standard of review of *Dandridge* and its progeny only lay down the governing principle for disposing of constitutional challenges to classifications in "social welfare legislation." 422 U.S. at

756. The holdings of these cases should not control in the instant case, since the underlying policy basis for the decisions is not present here.

This Court, in invalidating the Maryland statute, should adhere to the language found in *Deal v. Board of Education*, 369 F.2d 55, 59 (6th Cir. 1966):

The principle . . . is that the state may not erect irrelevant barriers to restrict the full play of individual choice in any sector of society. Since it is freedom of choice that is to be protected, it is not necessary that any particular harm be established if it is shown that the range of individual options has been constricted without the high degree of justification which the Constitution requires. It is harm enough that a citizen is arbitrarily denied choices open to his fellows.

CONCLUSION

The Maryland statute has been construed by the United States District Court for the District of Maryland to deny the Appellants the equal protection of the laws as guaranteed by the fourteenth amendment to the United States Constitution. This Court should require further argument to be heard in this matter and reverse the decision below.

Respectfully submitted,

JOHN J. BISHOP, JR.

Attorney for Appellants.